No. 80-642

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ELEANORE M. RAYMOND, ADMINISTRATRIX OF THE ESTATE OF ALVARO J. RAYMOND,
PETITIONER,

v.

I/S CARIBIA,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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STATEMENT OF THE CASE

The Petitioner's decedent was a longshoreman discharging cartons of frozen fish from the refrigerated hold of the vessel CARIBIA. The cartons were 15 inches by 12 inches by 12 inches and weighed approximately 55 pounds. He was part of a gang of 12 longshoremen in the hold manually breaking down

and discharging that cargo. He had been performing those stevedoring duties for approximately two hours when he and the other longshoremen working in one corner of the hold encountered certain cartons which were sticking together, being frozen to a greater degree than the balance of the cartons, and which thus did not yield to the gang's use of hand hooks. When the gang encountered that difficulty work stopped.

The crowbars and ice bars which were customarily maintained by the stevedoring company for that purpose were in a tool shed on shore. To save time, since the longshoremen work on piece work, the longshore boss requested some of the crew of the vessel to use crowbars on the cartons.[1]

Two crewmembers, who were not otherwise identified by the Petitioner's witness, applied the momentary leverage of a crowbar to the seams between the cartons as the longshoremen stood by and watched them. The crewmembers made no attempt to remove the cartons; the cartons plainly remained in their same tiered positions with all interfaced frozen surfaces re-encountering each other. The crewmembers left to the longshoremen the burden of moving the cargo and overcoming such residual sticking as would instantly occur. There was no conversation between the longshoremen and the crewmembers, but the longshoremen identified the cartons which needed the preliminary leverage of crowbars and watched while the rough loosening was accomplished.[2]

The crewmembers were not asked to place dunnage in between the cartons to forestall the natural tendency of the cartons' surfaces to re-adhere to some degree in the refrigerated

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[1] Longshoremen at Gloucester are paid by the ton rather than by the hour. Although when the difficulties encountered are extensive they may negotiate with their employer for a higher rate of pay, speed serves the economic interest of the longshoremen.

[2] It is unknown whether the unidentified crewmembers spoke English.

hold. Discharging such cargo was within the routine tasks of the longshoremen. The crew did not in any degree discharge the cartons. That was the work of the longshoremen. The crew did not purport to dislodge or disturb the cartons from their position in the stow, but only to momentarily pry against the heavy solidification. The longshoremen were accustomed to a sticking condition of the cartons and had their hand hooks for that purpose. The decedent was an experienced longshoreman familiar with frozen cargo; he was accustomed to handling weights approximating 100 pounds. He was present when the work stopped and stood watching while the crowbars were being used on the cartons. He observed that the crewmembers only applied the gross force of the crowbars to initially loosen the frozen cartons and that the cartons then settled back to their original position with the weight of an upper tier still bearing on the lower tier.

Neither the decedent nor any of the other longshoremen indicated that the limited loosening of the cargo by the crewmembers was improper or inadequate to permit them to continue the manual breaking down of the cargo.

The longshoremen resumed the manual handling of the cartons and taking them from the tiers and placing them on a rack for discharge. After several cartons had been discharged without difficulty, the Petitioner's decedent reached a carton which was on a tier at a height about at the decedent's shoulder and eye level. His view of the cartons was not obscured. Testimony was presented that the decedent reached over the far edge of the carton and tilted it toward him. The carton from the next lower tier adhered to the bottom surface of the upper carton but the decedent continued to tilt those two adhering cartons toward him. He then angled both cartons upward in a tilted position. Finally he pulled them both toward him until the lower surface of the bottom carton came free from the carton underneath it. The two adhering cartons he was pulling toward him did not slip off the lower tier at

any time. After he had pulled the two cartons free of their tiered position, he began to lower them, but as he did so he went down on one knee, apparently under the weight of the two cartons. Sometime thereafter, the decedent was noticed to look pale and to complain of not feeling well. He declined medical assistance and asserted his ability to get home without aid. He drove from the pier where he had been employed to a pier approximately one-half mile away where the Union Hall and Shape-Up offices were maintained. Near the Union Hall his car was in a collision with a truck. He was found dead in his car after that accident. A medical expert called by the Petitioner testified that it was his opinion that the decedent had suffered a heart attack and that the heart attack was caused by the particular action of lifting the double weight of the two cartons earlier that afternoon.

The shipowner was charged with negligence for failing to properly separate the cartons and for failing to warn the decedent of the risk resultant from the adhesive quality of the frozen cargo.[3] The case was submitted to a jury after denial of defendant's motion for a directed verdict. The jury found liability against the defendant under 33 U.S.C., Chapter 18, Section 905(b), the text of which follows:

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be

[3] Johan Hagenaes and A/S Norsk Frysetransort are companies affiliated with I/S Caribia, respondent-shipowner.

permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

On appeal by the defendant shipowner, the First Circuit Court of Appeals reversed on the grounds that the Court should have granted the motion for judgment notwithstanding verdict in favor of the defendant. The Court of Appeals held that under the standards set forth in *Johnson* v. *Ivarans Rederi*, 613 F.2d 334, (1st Cir. 1980) there was no basis for finding the ship negligent. The Court found that there was no unreasonable risk of harm and that under all the circumstances the ship had not failed to exercise reasonable care.

Argument

I. THE PETITIONER HAS FAILED TO CITE, AND THERE DOES NOT EXIST, ANY APPLICABLE CONFLICT AMONG THE CIRCUITS.

II. THE PETITIONER HAS NOT DESCRIBED, AND THERE DOES NOT EXIST, AN IMPORTANT QUESTION OF FEDERAL LAW APPROPRIATE FOR RESOLUTION BY THIS COURT.

I. THE PETITIONER HAS FAILED TO CITE, AND THERE DOES NOT EXIST, ANY APPLICABLE CONFLICT AMONG THE CIRCUITS.

The decision of the First Circuit herein accords with and does not conflict with the standards set forth by the First,

Third and Ninth Circuits in *Johnson* v. *Ivarans Rederi*, 612 F.2d 334, (1st Cir. 1980); *Griffith* v. *Wheeling-Pittsburgh Steel Corp.*, 610 F.2d 116, (3rd Cir. 1977) and *Santos* v. *Scindia Steam Navigation Co.*, 598 F.2d 480, (9th Cir. 1979). There is no conflict among the Circuits which would inure to the benefit of the Petitioner.[4]

In the present case, the First Circuit met the concerns which it had voiced in *Johnson* supra, and which had been expressed by the Ninth Circuit in *Santos* supra, and by the Third Circuit in *Griffith* supra. Within that precedential framework it applied a standard which considered all the factual circumstances and which was consistent with the traditions of maritime law and the legislative intention to promote safety. As the Third Circuit noted in *Griffith* supra, the particular application of the general standard of care must be formulated on a case-by-case basis. *Griffith*, p. 126. In the instant case the First Circuit determined that on the facts presented the accepted standard of care had not been violated.

There is no dispute between the Circuits; the only dispute is between the Petitioner and the First Circuit. The Court properly ruled that in all the circumstances there was not an unreasonably dangerous condition and that the shipowner had not failed to use reasonable care to protect the longhsoremen in the performance of their duties.

The Petitioner has mistaken both the First Circuit's holding and the facts by framing the issue as the First Circuit's refusal to find liability for a "dangerous condition of cargo created

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[4] As the First Circuit noted in Johnson, the Second, Fourth, Seventh and Fifth Circuits have adopted a standard of care which incorporated the principles of Restatement of Torts, Second, Sections 343 and 343A. Petitioner has not contended that this standard of care should have applied in lieu of the standards of *Griffith*, *Johnson* and *Santos* which the First Circuit followed herein.

by the shipowner."[5] (Petition, p. 6)

Initially and contrary to the Petitioner's factual assertion that the decedent had "performed his work following the directions of the vessel's crew" (Petition, p. 9), the First Circuit found on the evidence presented that the crewmembers were not directing the discharging, (App. p. 16), and that the crew was merely assisting the longshoremen's own work. Despite the decision of the gang boss to expedite the discharging by requesting the crew to furnish the force of the crowbars rather than the longshoremen using their own gear and renegotiating a higher rate of pay, it was clear that the preliminary loosening of the cartons was a duty and a skill of the longshoremen and not of the crew.

Secondly, contrary to Petitioner's assertion as to the basis for the First Circuit's holding (Petition, p.9) the First Circuit's opinion is devoid of the concepts of assumption of the risk and of the Restatement of Torts, Second, Sections 343 and 343A. The Court's statements to which the Petitioner has taken exception do not re-interject those concepts which the First Circuit expressly disavowed in *Johnson*, supra. The Petitioner has suggested that the Court's observations imply that the decedent "assumed the risk of the frozen cargo." However, the Court's comments as to the relative roles of the crew and the longshoremen are not premised upon and do not reflect concepts of assumption of the risk. The First Circuit only stated the elementary fact, often noted by Courts, that the discharging of the cargo is the function of the stevedore and longshoremen and not that of the crew. *Knox* v. *United States Lines Company*, 294 F.2d 354, (3rd Cir. 1961), 1961 AMC 1708; *Bell* v. *Nihonkai Kisen, K.K. Tokyo*, 204 F. Supp. 230, (D.C. Ore. 1962), 1962 AMC 1306; *Baker* v. *S/S*

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[5] Indeed the First Circuit suggested that a dangerous condition created by the crew in the cargo area might be a basis for liability; "If one of the crewmembers left a crowbar among the cartons in such a position that it injured a longshoreman, there might be liability." App. p. 17.

Cristobal, 488 F2d 331, (5th Cir. 1974), 1974 AMC 36; *Mende* v. *H/F Eimskipafelag Islands*, 1972 AMC 1055 (D.C. Md. 1971); *Nixon* v. *Zim Israel Navigation Co., Ltd.*, 1971 AMC 1951 (D.C. Fla. 1971); *Anderson* v. *Iceland S.S. Co.*, 585 F.2d 1142, (1st Cir. 1978).

However, if, as Petitioner states, the risk was that the cargo was frozen this would accord with the Court's determination that there was no unreasonable risk. Indeed that the cargo was frozen was not a risk; it was a fact native to a cargo of frozen fish in a refrigerated hold. The momentary force applied by the crowbars could not prevent the cartons from re-adhering. The crew did not, was not expected to, and did not purport to do more than they did. Overcoming the residual tendency of the surfaces to adhere and dislodging the cartons was the routine work of the longshoremen and, as the First Circuit held, posed no unreasonable danger to them.

In none of the cases cited by the Petitioner did the Court find liability in a condition of the cargo where, as here, the cargo handling was being supervised by the longshoremen, the stowage was proper, and no substandard equipment was involved.[6]

The First Circuit's evaluation of all the circumstances differs from that which Petitioner has advanced; it does not differ from the principles and application of those principles previously adopted by the First Circuit in *Johnson* supra, and by the Third, Seventh and Ninth Circuits in *Griffith*, supra, *Mathews*,[7] and *Santos*, supra.

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[6] In *Santos*, supra, where the longshoreman was injured by a sack of grain falling from a pallet being lowered by the ship's winch which had been slipping, neither the Court nor the plaintiff suggested that the ship had any liability for the way the cargo was stacked on the pallet.

[7] *Mathews* v. *Ernst Russ Steamship Company*, 603 F.2d 676 (7 Cir. 1979)

II. The Petitioner Has Not Described, and There Does Not Exist, an Important Question of Federal Law Appropriate for Resolution by This Court.

The First Circuit explicitly premised its decision herein on its previous holding in *Johnson*, supra. The Petitioner does not contend that those principles were not the proper standards by which to determine the ship's liability; Petitioner simply asserts that the First Circuit misapplied the standard to the facts. On its face, this argument does not raise an important issue of Federal law which requires resolution by this Court. The issues raised by the Petitioner are fundamentally a disagreement with the First Circuit's evaluation of the factual circumstances and its holding that in those circumstances, including a consideration of the type of condition and danger, it was not established that any negligence of the shipowner-caused the injury to Petitioner's decedent.

The First Circuit's evaluation of the factual circumstances presented was a proper application of the principles it had previously adopted in *Johnson*, supra. Specifically, the First Circuit found that there was no evidence from which it could be found that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to the longshoremen. As the Court of Appeals noted, it was not disputed that longshoremen commonly handle weights approximating 100 pounds. The decedent had a clear view of the cartons as he tilted them up and slid them the 12 to 15 inch dimension preliminary to receiving the full weight of the two cartons. The Court concluded that, "It would be stretching credulity to find that there was an unreasonable risk of harm to an experienced longshoreman in attempting to hold two cartons weighing about 110 pounds even though the extra 55 pounds was unanticipated." (App. p. 18) Thus, and in accord with the requirements of Johnson, supra, the Court found that, even assuming arguendo that the first criteria of *Johnson*

had been met, i.e., that the vessel knew of the condition which led to the injury, there was no factual basis for finding that the two remaining elements of the Petitioner's cause of action had been established, namely that the vessel knew or should have known that the condition would pose an unreasonable risk of harm to the longshoremen and that the vessel failed to exercise reasonable care to protect the longshoremen against that danger.

In the instant case, the First Circuit did not hold that the Petitioner's decedent assumed the risk of discharging the frozen cartons or that his contributory negligence barred his recovery. Rather, the First Circuit held that the condition of 15-inch cartons was not unreasonably dangerous to the longshoremen, that the carton's removal was a task not unreasonably suited to the longshoremen's ordinary skills, and that the risk of a heart attack from sudden physical exertion was a risk to the longshoremen which the shipowner could not guard against.

The Petitioner has mistakenly equated a holding that in all the circumstances the shipowner was not negligent with a holding which must rely upon the principles which were clearly discarded by the First Circuit in *Johnson*, supra, and not revived in the instant case. The First Circuit's evaluation of the factual circumstances and its conclusion that under the standards of *Johnson*, supra, *Griffith*, supra, *Santos*, supra, and *Kermerac* v. *Compagnie Generale Transatlantic, Inc.*, 358 U.S. 625, 79 S.Ct. 406, 3L.Ed. 2d 550 (1959), the vessel was not negligent does not present an issue of Federal law appropriate for resolution by this Court.

Conclusion

The decision of the First Circuit Court of Appeals was proper under the existing law as applied to the facts. It does not represent a conflict among the Circuits and it does not present

an issue of Federal law appropriate for resolution by this Court. It is, therefore, submitted that the Petition for Certiorari to the First Circuit Court of Appeals should be denied.

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